

House of Representatives Standing Committee on Employment, Education and Training

Inquiry into the Digital Transformation of Workplaces

QUESTION ON NOTICE

Date of hearing: 20 September 2024

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ24-000047

Ms Lisa Chesters MP on 20 September 2024, Proof Hansard page 2

20 September 2024 | Security of recorded conversations

Question

CHAIR: I have two examples—to see whether these have come up with the department, and whether Safe Work or the department have issued any guidance, or it's under consideration. Now, you might've noticed yourself, when you call a bank or when you call your insurance company—even when you call a motor mechanic to book your car in for a service—the message has changed to, 'This conversation will be recorded for quality and training purposes.' So all our conversations that we're now having with a lot of organisations are being recorded.

The questions that came up quite a lot are around the security of that data; the ethics around storing that data and how long it is stored for; and the use of that data for employee human resource management. The concerns that came from a few of the unions and witnesses were, 'Could I be sacked because of the recordings and algorithm?' It then also raised a broader question around the ethical nature of storing data and how long it's stored for.

Mr Jones: There are probably two parts to that question. The first, around the collection and storage of data, probably goes to the Privacy Act, which is administered by the Attorney-General's Department. As you'd be aware, there's been a review of the Privacy Act. I think there is an initial tranche of legislation before the parliament at the moment on some of those and potentially a future one planned. I can't really speak too much to the detail of that—it not being our portfolio—but I'm happy to take that on notice and help direct that to AGD if you'd like.

Answer

The *Fair Work Act 2009* contains provisions around terminating employment including, among other things, whether the termination of the employment was unlawful or unfair, what notice must be given, and what entitlements an employee is owed at the end of their employment.

The Privacy Act 1988 (Cth) (Privacy Act) regulates the handling of personal information about Australians. It contains 13 Australian Privacy Principles (APPs) that set out obligations for the management of personal information. The Privacy Act applies to Australian Government agencies and private sector organisations with an annual turnover of \$3 million or more and to certain small businesses, for example, where the business is providing a health service.

An organisation covered by the Privacy Act must not collect personal information unless it is reasonably necessary for one or more of the entity's activities or functions (APP 3) and must take such steps as are reasonable in the circumstances to protect personal information it holds from misuse, interference, loss, unauthorised access, modification or disclosure (APP 11).

The Privacy Act exempts non-government employers from the operation of the Act for acts or practices directly related to its employment relationship with an individual and an employee record it holds relating to the individual. The Privacy Act Review included a proposal (Proposal 7.1) that enhanced privacy protections should be extended to private sector employees. The Government Response to the Review agreed in-principle with that proposal. The Government recently introduced the Privacy and Other Legislation Amendment Bill 2024, which would implement a first tranche of privacy reforms. In the coming months, the Government will continue work on a second tranche of reforms to the Privacy Act through further targeted consultation with stakeholders on draft provisions. This targeted consultation will inform the Government's decision making on next steps and a second package of reforms.

The *Fair Work Act 2009* requires employers to make, and keep for 7 years, employee records in relation to each of its employees. The *Fair Work Regulations 2009* provide details on the types of information required to be maintained in employee records.

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QUESTION ON NOTICE
Date of hearing: 20 September 2024

Outcome: Workplace Relations

Department of Employment and Workplace Relations Question No. IQ24-000048

Ms Lisa Chesters MP on 20 September 2024, Proof Hansard page 3

20 September 2024 | Guidance on AI use in the workplace

Question

CHAIR: Has the Fair Work Ombudsman, or your department, ever issued guidance models? I can remember there being something issued once for: 'If you do these things, this is what a contractor is. If you do these things, this is what an employee is.' I also remember there being something very similar around unfair dismissal. Are there any plans to adapt that to say exactly that technology isn't advised to be used as the only source around employee management and that there needs to be human interaction, or something like that? Are there any plans to, rather than having it as a regulation, having it as more of a guidance to help educate employers about the safe and ethical use of AI in the workplace?

Mr Jones: In terms of whether the Fair Work Ombudsman has any plans like that, I'd have to take it on notice for the moment, but I'm not aware of any, in terms of the department.

CHAIR: I do apologise. We did ask them to come and they refused.

Mr Jones: No worries.

CHAIR: If you could take that on notice, that would be great

Answer

The Department generally does not issue guidance on its website to assist employer's meet their obligations under the *Fair Work Act 2009*. Section 682 of the *Fair Work Act 2009* states that it is the responsibility of the Fair Work Ombudsman to provide education, assistance and advice to employees and employers and produce best practice guides to workplace relations or workplace practices.

The Fair Work Ombudsman has provided the following response. The Fair Work Ombudsman (the Ombudsman) offers a broad range of free online tools and resources that provide employers and employees with information about their workplace entitlements and obligations arising under the *Fair Work Act 2009*. These online tools include a pay and conditions calculator, an award finder tool, fact sheets, best practice guides, template letters and an online learning centre.

The best practice guides, for example, are designed to assist small business in particular with guidance covering a range of workplace issues including but not limited to: flexible working arrangements, consultation and cooperation in the workplace, workplace privacy, and effective dispute resolution.

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Department of Employment and Workplace Relations Question No. IQ24-000049

Ms Lisa Chesters MP on 20 September 2024, Proof Hansard page 6

20 September 2024 | Worker surveillance

Question

CHAIR: Why is the issue of worker surveillance not a Commonwealth responsibility? Could you put it in the National Employment Standards?

Mr Jones: I'd have to take that on notice.

Mr Kerr: I think those divisions usually reflect the respective constitutional powers of the Commonwealth and the states. But, as to whether it could be implemented at the Commonwealth level, we'd probably have to look at that in detail.

Answer

Regulation of workplace surveillance is generally a state and territory issue. There are also privacy implications, which are jointly regulated between the Commonwealth and the states and territories.

The *Fair Work Act 2009* (Fair Work Act) is based on a range of constitutional powers, including referrals of power from the States. The state referrals of power support amendments to be made to the Fair Work Act in relation to certain subject matters, not including 'excluded subject matters'. 'Workplace surveillance' is a listed excluded subject matter. It is therefore not possible for there to be a harmonised scheme relating to workplace surveillance in the National Employment Standards (NES).

The Australian Capital Territory, New South Wales, and Victoria all have legislation that specifically considers workplace surveillance. South Australia, Tasmania, Western Australia, the Northern Territory and Queensland do not have specific workplace surveillance laws in place. Workplace surveillance in those states is covered by general privacy and surveillance laws.